franchise areas such services collectively serve. Unlike the 15 percent penetration test, there is no dispute that Congress intended the Commission to apply the 50 percent test to multichannel video programming distributors on an individual basis; the "effective competition" test does not permit the Commission to determine that SMATV providers, on a cumulative basis, have the capability of serving more than 50 percent of the households in each franchise area nationwide.

Second, as the Commission aptly notes, "SMATV service typically contemplates an owner or manager of a multiple unit building contracting with an off-premise operator who . . . feeds a package of programming to the multiple unit residents." Order at ¶ 31. Hence, as the Commission apparently recognizes, such service is not available to single-unit family residences. Even if the Commission concludes that SMATV services should be counted collectively in determining whether the 50 percent test is met, such services could not serve 50 percent of the households in franchise areas where more than 50 percent of the households are not multiple unit dwellings.

Third, the Commission's finding is based on the mistaken presumption that "[a]ll consumers need to do to receive the [SMATV] service is . . . arrange for SMATV service." Order at 31. Unfortunately, residents in

multiple dwelling units do not have the authority to

broadcast stations offered in a franchise area. In fact, Congress expressly rejected the Senate version of an "effective competition" standard based on the presence in a franchise area of other multichannel video programming and a "substantial" number of local broadcast signals. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 58-66 (1992) ("1992 Conference Report"). Hence, the standard that the Commission adopted -- which would count as comparable programming an offering of 12 channels of programming, eleven of which may be broadcast programming -- is directly contrary to Congressional intent that "effective competition" must be measured on a basis other than the provision of a "substantial" amount of broadcast programming.[12]

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[12] Under the Commission's definition, for example, a packager of programming that provided eleven channels of broadcast programming and a menu channel containing a schedule of programs on the broadcast channels, would apparently be considered to be offering comparable programming. This example is based on the assumption that a menu channel would constitute "nonbroadcast service programming," which is not defined in the Commission's Order or rules. Moreover, even if the Commission defined "nonbroadcast service programming" to include only full action video programming, Local Governments believe that such a clarification is still inadequate. A landlord, who by use of a VHF/UHF antenna can provide eleven channels of broadcast programming to his tenants, would be considered a "multichannel video programming distributor" offering "comparable programming" under the Commission's definition of "comparable programming" if he simply piped into his tenants' residences the eleven broadcast channels and whatever programming the landlord might provide over his or her video cassette recorder, such as home movies of the landlord's family.

Second, a multichannel video programming distributor offering twelve channels of programming (even if most of it is nonbroadcast programming) simply is not offering programming "comparable" to a cable system offering, for example, 60 channels of programming. The Commission's assumption that the smaller system is providing comparable programming is inconsistent with classic economic theory and antitrust law -- two disciplines in which the term "effective competition" is widely used and understood.[13]

Third, the Commission's definition of "comparable programming" appears to be based in part on its

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[13] Under antitrust law, the Supreme Court has held that products must be "reasonably interchangeable" by consumers to be competitive with each other. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (in determining the relevant market in an antitrust claim, the Court concluded that interchangeability rests on considerations as to "price, use and qualities"). For cases in which a product or service consists of more than one component, such as cable service with its tiers of programming service offerings, the Supreme Court has developed an additional analysis that takes into account the unique nature of the package as well as the availability of substitutes for each component. In determining the area of effective competition for such packages, the Court has adopted a "cluster" approach, which includes within the relevant market only those goods or services that include the entire range of offerings of the original product. See, e.g., United States v. Connecticut Nat'l Bank, 418 U.S. 656, 664 (1974) (individual services offered by savings bank -- as then limited by regulatory authorities -- were not substitutes for packages of services offered by commercial bank). The "cluster of services" analysis is particularly appropriate for a cable television system, which makes available an array of services through a single communications medium.

erroneous assumption that Congress intended to create effective competition only for basic cable service. See Order at 38 ("This definition of 'comparability' should ensure alternative service is competitively comparable to a minimum basic tier service that an incumbent cable operator could offer"). Neither the 1992 Cable Act nor its legislative history suggests such a narrow reading of "comparable programming" or "effective competition." One of the major purposes of the 1992 Cable Act is to ensure that "where cable television systems are not subject to effective competition, . . . consumer interests are protected in the receipt of cable service." Section 2(b)(4), 1992 Cable Act. Clearly, Congress was interested in providing competition to the package of services offered by cable operators, and not to just a particular service offered by cable operators.

In light of the above, Local Governments recommend that the Commission define "comparable programming" as programming provided by a competitor to a local cable system that provides approximately the same number of non-broadcast video programming services. Local Governments suggest that multichannel video programming distributors should be considered to offer comparable programming only if there is a 20-percent or less difference in the number of channels of nonbroadcast programming offered by the distributors.

Although the 20-percent test is only an estimate of the "zone of reasonableness" of comparable programming, it is consistent with Congress' intent that competitors provide "comparable" programming, and is easily administrable -- thus reducing administrative burdens on the Commission, franchising authorities and cable operators in applying.

The definition of "comparable programming" recommended above should alleviate the Commission's concern that it not be put in the "difficult position of comparing the quality and content of programming offered by the competing service." Order at ¶ 38. The Commission or a franchising authority simply would need to count the number of non-broadcast services on the competitors' systems.

C. Certification Process

1. FCC Regulation of Basic Rates in a Franchise Area Should not Be Contingent on a Finding that Franchise Fees Are Insufficient to Cover Rate Regulation Expenses

The Commission should reconsider its requirement that, as a condition of regulation by the Commission of basic rates, a franchising authority demonstrate that its franchise fees are insufficient to cover the cost of rate regulation. See 47 C.F.R. §76.913(b)(1). Such a requirement is in violation of Section 622 of the Cable Act.

Section 622(i) expressly prohibits a federal agency from regulating the use of funds derived from franchise fees. In enacting the 1984 Cable Act, Congress made clear that the franchise fee test for rate regulation adopted by the Commission is impermissible: "Subsection 622(i) prohibits any agency of the United States, including the FCC, from regulating the amount of the franchise fee or the use to which the funds collected through the fee will be put." H.R. Rep. No. 934, 98th Cong., 2d Sess. 65 (1984) (emphasis added).

Local Governments do not oppose the requirement under 47 C.F.R. §76.913(b)(1) that a franchising authority demonstrate that it "lacks the resources to administer rate regulation"; however, Local Governments believe that Section 622(i) requires that the Commission delete the proviso that requires that such a demonstration "be accompanied by a demonstration that franchise fees are insufficient to fund any additional activities required to administer basic service rate regulation." This proviso amounts to an impermissible requirement as to how franchise fees may be used since the Commission implies that it will not regulate basic rates if franchise fees are used for other purposes. Moreover, the proviso indicates a misunderstanding of the purpose for which franchise fees are collected.

Franchise fees are collected as compensation for the use of valuable public rights-of-way.[14] Franchise fees are not tied, as a matter of federal law, to the cost of regulating a cable system or funding other cable-related activities.

2. Certifications Should Be Revoked for Nonconformance with the Commissions Rules Only Upon a Showing that Local Regulations Are Substantially Inconsistent with the Commission's Rules

The Commission should reconsider its rules for revocation of certifications and include provisions that: (1) permit a franchising authority to cure any nonconformance with the Commission's regulations; and (2) clarify that a certification will be revoked only upon a showing that any nonconformance with the Commission's rules or inconsistency with Section 623 is substantial.

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[14] This contrasts with FCC practice prior to the 1984 Cable Act, under which franchise fees of up to three percent were permitted without FCC review, and fees of up to five percent were permitted on the basis of a showing that they would be used for cable regulation or other permissible cable-related purposes and would not impair the financial viability of the system or interfere in other ways with the effectuation of federal regulatory goals in the field of cable television. See 47 C.F.R. §76.31 (1984). In 1986, the Commission expressly eliminated its rules on franchise fees on the grounds that the 1984 Act superceded such rules and replaced them with specific statutory provisions. See Memorandum Opinion and Order, MM Docket No. 84-1296, 60 R.R.2d 5124, 517 (1986).

The Commission's rules permit a franchising authority to cure any defects in local regulations if such regulations are inconsistent with the statutory requirements in 47 U.S.C. § 543. 47 C.F.R. §76.914(a)(2). However, where the issue is whether local regulations are in conformance with the regulatory requirements established by the Commission, an opportunity to cure a defect is not provided and the certification is revoked if the Commission determines that such regulations do not conform to the Commission's requirements. 47 C.F.R. §76.914(a)(1). The distinction between these two grounds for revocation does not appear to serve any purpose. Franchising authorities should be permitted an opportunity to cure any nonconformance, regardless of whether such nonconformance is with Section 623 of the 1992 Cable Act or with the Commission's rules.

Providing a franchising authority an opportunity to cure any nonconformance with the Commission's rules would preserve the scarce resources of the Commission and franchising authorities. In the absence of the opportunity to cure, franchising authorities would be -

may be avoided by providing a franchising authority an opportunity to cure.

The Commission also would preserve scarce resources if revocation for nonconformance or any inconsistency only occurred if the Commission finds that such nonconformance or inconsistency would substantially and materially interfere with compliance with the Commission's regulations or Section 623. Local regulations should be found to substantially or materially interfere with the Commission's rules or Section 623 only where they are irreconcilable with the rules or statute.

D. Basic Service Tier Regulation

1. Franchising Authorities Have the Right Under the Cable Act to Establish the Number of Channels on the Basic Service Tier

Local Governments request that the Commission reconsider its conclusion that the "statutory definition of the basic service tier preempts provisions in franchise agreements that require additional services to be carried on the basic tier." Order at ¶ 161. Such an interpretation conflicts with other provisions in the Cable Act, and is not required by Section 623.

First, Section 625 of the Cable Act expressly permits franchising authorities to enforce franchise provisions that prohibit a cable operator from retiering programming from basic to another tier. For example, Section 625(a)(1)(B) permits a franchising authority to prohibit a cable operator from changing the "mix, quality or level" of cable services required in a franchise unless the cable operator demonstrates that such "mix, quality or level" or services remains the same after any modification.[15] To the extent a franchising authority determines that the retiering of programming from basic to any other tier changes the

[15] Moreover, for franchises in effect prior to enactment of the 1984 Cable Act, a franchising authority may "enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system." Section 624(c).

"mix, quality or level" of services on the basic tier, Section 625 permits a franchising authority to prohibit such a modification of services.

Moreover, Section 625(d) states that "a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under Section 623." Hence, cable operators subject to rate regulation under Section 623 would be prohibited from retiering programming, although the Commission is correct in assuming that Section 623(b)(7)(B) may permit a cable operator not subject to rate regulation to retier programming -- assuming that such retiering is not in violation of Sections 625(a)(1)(B) or 624(c).

Third, Congress expressly amended the 1992 Cable Act to permit franchising authorities to take into account the number of channels on a tier of service a cable operator provides for purposes of renewal. Congress permitted such consideration by striking from the renewal provisions in Section 626 the provision that prohibited franchising authorities from taking into account the "level" of services a cable operator provides in determining whether to renew a franchise. 1992 Conference Report at 36-37. Such a right would be

meaningless -- and in violation of Congressional intent in amending Section 626 -- if the Commission prohibited a franchising authority from requiring that a cable operator provide a certain level of services on the basic tier.

The Commission's preemption of franchise provisions establishing minimum channel requirements on the basic tier is clearly inconsistent with the above provisions -- two of which were not amended by the 1992 Cable Act to prohibit local enforcement of basic channel requirements, and one of which was, in fact, added by the 1992 Cable Act. Congress obviously intended a much narrower interpretation of Section 623(b)(7)(B) than the interpretation adopted by the Commission. Section 623(b)(7)(B) states that a cable operator "may add additional video programming signals or services to the basic service tier." (Emphasis added.) In light of the above discussion, Congress intended that a cable operator "may" have such a right so long as it has not given up such a right in a franchise agreement requiring that a certain number of channels be on the basic service tier.[16]

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[16] Local Governments believe that, in light of the above statutory provisions, the Commission's reasons for preempting channel requirements in franchise agreements are unpersuasive. First, the Commission states that "Congress clearly envisioned that broadcast

[Footnote continued on next page]

As shown above, there is no evidence in the 1992 Cable Act to support the Commission's contention that Section 623(b)(7)(B) requires it to preempt franchise provisions governing the number of channels on the basic tier. In fact, Sections 625 and 626 of the Cable Act demand the opposite conclusion -- that such provisions

requiring parties filing appeals with the Commission to serve a copy of the appeal on the franchising authority that made the basic rate decision. 47 C.F.R. §76.944(b). Such a requirement is consistent with other provisions in the Commission's rules. See, e.g., 47 C.F.R. §76.914. Given the short time period for parties to file comments in an appeal proceeding, such notice is critical if franchising authorities are to have an opportunity to comment on a party's appeal.

3. The Commission Should Ensure That Cable Operators Do not Evade Rate Regulation By Increasing the Number of Menu, Directory or Similar Channels on a Cable System

Counting menu, directory and similar services on a cable system as channels for purposes of determining the per channel benchmark rate to which a cable operator is entitled creates a significant potential for manipulation by cable operators of the rate to which they are entitled. Local Governments believe that cable operators may suddenly activate unused channels on a cable system, or drop other programming services, in order to include a number of such low cost channels. The Commission should consider any such actions by cable operators as an attempt to evade rate regulation in violation of Section 623(h) and prohibit a cable operator from recovering a per channel cost for such channels. Evidence of such an evasion might be, for

example, an increase in the number of such channels on the system since September 30, 1992 -- the date the Commission used to determine its benchmark rates.

E. The Commission Should Ensure that Complaints Challenging Current Cable Programming Service Tier Rates During the Statutory 180-Day Period Are Grandfathered for Purposes of Further Rate Reductions that May Be Necessary After Any Initial Rate Reductions Ordered by the Commission

Local Governments urge the Commission to clarify its rules regarding cable programming service complaints by including a provision that would grandfather complaints filed during the 180-day statutory period under Section 623(c)(3) during which complainants may challenge existing rates, for purposes of permitting additional rate decreases after expiration of the 180-day period. In light of the Commission's suggestion that it may order further rate reductions in the future if its cost-of-service studies demonstrate that cable subscribers are entitled to further reductions, such a provision is necessary to ensure that complainants filing during the 180-day period receive the full reduction in rates to which they are entitled. The Local Governments' concern is illustrated by the following example:

A cable subscriber may file a complaint on October 1, the effective date of the Commission's rules, concerning a programming service rate in effect on that

date. The Commission may determine on December 1 that the rate is unreasonable and should be reduced by 10 percent. The period for filing complaints regarding rates in effect on October 1 will expire on approximately April 1, 1994. The Commission might determine on May 1, 1994 that cable rates should have been reduced by 28 percent instead of 10 percent. However, pursuant to Section 623(c)(3), the Commission's right to reduce cable programming service rates in effect on October 1, 1993 expired on April 1, 1994.

Based on the preceding example, Local Governments do not dispute that the Commission's right to reduce cable programming service rates on May 1, 1994 has expired in franchise areas where a complaint was not filed by April 1, 1994 challenging a rate in effect on October 1, 1994. However, Local Governments urge the Commission to clarify that if a complaint challenging such rates was filed by April 1, the Commission would have the right, based on that grandfathered complaint, to order the cable operator to further reduce its rate in light of, for example, cost studies justifying further reductions.

F. Benchmark and Price Cap Rates

1. The Commission Should Apply a Single "Initial Date of Regulation" to Both Basic And Cable Programming Service Tiers, and Require a Cable Operator to Submit the

Same Rate Schedule in Both Basic and Cable Programming Service Tier Rate Proceedings

Local Governments urge the Commission to reconsider its decision to establish separate dates for determining the "initial date of regulation" of basic and cable programming service tiers.[17] The establishment of such separate dates will result in confusion in determining permissible rates and rate increases.

The Commission should establish instead a single initial date of regulation that applies to both basic and cable programming service tiers. Such date should be the earlier of the date on which a cable operator receives notice from the franchising authority that the basic tier is subject to rate regulation, or the date on which a complaint is filed on the appropriate FCC form challenging the reasonableness of a cable programming service tier rate.

The purpose of the single initial date of regulation is to ensure that future rate increases by a cable operator on the basic tier and any cable

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[17] Under 47 C.F.R. §76.922(b)(2), the initial date of regulation of the basic service tier is the date that a franchising authority gives local notice that the provision of the basic tier is subject to rate regulation. The initial date of regulation for a cable programming service tier is the date on which a complaint on the appropriate form is filed with the Commission concerning the rate for that tier of service.

programming service tier would be subject to the Commission's price cap formula. The price cap formula would apply to the actual rates in effect on the initial date of regulation, including the rate for a basic or cable programming service tier that is below the rate for such tier permitted by the Commission's benchmark formula.[18] See, e.g., Order at ¶ 232.

Since all tiers would be subject to the rate cap formula, the rates for such tiers of service would increase at roughly the same rate.[19] The establishment of a single date of initial rate regulation is consistent with the Commission's goal of ensuring that the same method of determining a reasonable rate applies to both basic and cable programming service tiers.

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[18] Although the initial date of regulation would be the same for all tiers subject to rate regulation, not all of the cable operator's tiers of service would be subject to review by the Commission or franchising authority at such time. At such time, the cable operator, as required under the rules, would still need to file its initial schedule of rates only in response to a complaint or to the initial notice from the franchising authority.

[19] Under the Commission's current rules, however, a cable operator would be limited to a rate increase permitted by the price cap only on a tier for which the rates have been reviewed by the Commission or a franchising authority. On tiers for which the rates have not been reviewed by the Commission or a franchising authority, the cable operator would be permitted to impose rate increases far in excess of that permitted by the price cap.

Consistent with this goal, Local Governments urge the Commission to reconsider its decision to grant cable operators the option of determining whether to submit a benchmark or cost-of-service schedule in response to local notice of basic rate regulation or a cable programming service tier complaint. See, e.g., 47 C.F.R. §76.922(b). To ensure that the "reasonable" rate established for each tier is consistent, a cable operator, whatever method it chooses, should be forced to make the same submission in both the basic and cable programming service tier rate proceedings, if both proceedings occur within a reasonable time of each other. For instance, assume the cable operator chooses a cost-of-service showing to support its basic rate. The Commission, assuming that it has been requested by the local franchising authority to regulate the basic rate, may review such rate and establish a reasonable rate which is less than that permitted under the Commission's benchmark formula. Assume that during the same time period, a cable programming service tier rate complaint is filed. In response to such complaint, the cable operator should not be able to force the Commission, which is reviewing a cost-of-service submission in the basic rate proceeding, to review a benchmark submission in the cable programming service tier rate proceeding. Instead, the cable operator

should be forced to submit the same cost-of-service showing to the Commission in the cable programming service rate proceeding.

A cable operator should be forced to submit the same rate schedule in both proceedings in order to prevent the cable operator from "gaming" the Commission's rules, and deciding that it may be more advantageous to submit a cost-of-service schedule in one proceeding, while submitting a benchmark schedule in the other. Such actions by the cable operator would undermine the Commission's intention that the same "reasonable" rate determination be made on both basic and cable programming service tiers.

2. The Commission Should Amend Form 393-Part III To Include A Table for Determining Home Wiring Charges

Pursuant to the Commission's home wiring rules, a cable operator must offer a subscriber home wiring on a per foot basis based on its replacement cost at the time a subscriber voluntarily terminate cable service.[20] Under the Commission's rate regulation rules, home wiring is treated as equipment and the rate a cable operator may charge for such wiring is supposed to be

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[20] Local Governments are suggesting that the rules clarify the rate charged for cable home wiring upon the termination of cable service, and are not suggesting that, like other equipment, cable subscribers pay for home wiring on a monthly basis.

determined in compliance with the Commission's rules for determining equipment costs. 47 C.F.R. §76.923. The forms for determining equipment costs are located at Form 393-Part III. The method for determining equipment costs are established at Steps C-E of that form. However, those steps are useful for determining the rate per month for equipment such as remote control units and converter boxes; such steps cannot be used to determine the rate per foot that a cable operator may charge for home wiring.

Local Governments urge the Commission to reconsider Form 393 and adopt a step for determining the per foot replacement cost for home wiring in order to assist cable operators, franchising authorities and the Commission in determining that charge. In keeping with the Commission's home wiring rules, such a per foot charge should be based on replacement cost.

3. The Commission Should Clarify that a Cable Operator May not Treat Increased Costs for Affiliated Programming as "External" Costs

The Commission's rules should be clarified to ensure that cable operators may not treat as an "external cost" increases in costs for affiliated programming. The rule governing affiliated programming costs as currently written states that "[a]djustments to permitted per channel charges on account of increases in costs of programming obtained from affiliated

programmers . . . shall be the lesser of actual increases or the previous permitted rate level increased by the rate of inflation." 47 C.F.R. §76.922(d)(2)(vi).

This language suggests that a cable operator is entitled to impose as an "external cost" any increase in affiliated programming costs up to the percentage rate increase on overall cable service permitted by the GNP-PI. Such treatment for affiliated programming is better than that the cable operator is permitted for non-affiliated programming. For non-affiliated programming, a cable operator is permitted to recover increases in programming costs only to the extent they "exceed inflation in order to prevent double recovery of costs" -- thus preventing cable operators from passing through programming increases less than the GNP-PI. Order at ¶ 251 n.599.

Such favorable treatment of affiliated costs under the rules is inconsistent with the Commission's stated intent in the Order to prevent "abuses that might occur if we permit vertically integrated cable operators to engage in unlimited pass-throughs of programming costs to their subscribers." Moreover, such treatment would be inconsistent with the Commission's stated intent, for all external costs (except franchise fees), "to permit external treatment for increases in costs

only to the extent they exceed inflation as measured by the GNP-PI." Order at 257.

In light of the Commission's intent to prevent abuses that might occur if affiliated programming costs are passed through, and to allow external costs only to the extent they exceed inflation, Local Governments believe the Commission intended to prohibit cable operators from not only recovering affiliated costs that exceed inflation, consistent with the rule as written, but to actually reduce cable rates to the extent of the difference between the percentage increase in the rate of inflation and the percentage increase in affiliated

the interpretation advanced above by the Local Governments.

III. CONCLUSION

For the reasons stated above, Local Governments urge the Commission to reconsider or clarify certain of its cable rate regulations.

Respectfully Submitted,

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